IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 16, 2006

STATE OF TENNESSEE v. KACY DEWAYNE CANNON

Direct Appeal from the Criminal Court for Hamilton County
No. 243913 Rebecca J. Stern, Judge

No. E2005-01237-CCA-R3-CD - Filed December 27, 2006

The Defendant, Kacy Dewayne Cannon, was convicted of aggravated rape, and the trial court sentenced him to thirty-two and one half years in the Department of Correction. On appeal, the Defendant contends that: (1) the trial court erred when it denied the Defendant's motion to suppress the identification of his DNA profile from the DNA databank; (2) the trial court erred when it admitted into evidence pantyhose because the State failed to establish a proper chain of custody; (3) the evidence is insufficient to sustain the Defendant's conviction; (4) his constitutional right to confrontation was violated; (5) the trial court erred when it denied the Defendant's motion to recuse; and (6) the trial court erred when it sentenced the Defendant. Finding that there exists reversible error with regard to the sentencing of the Defendant, we affirm the conviction and remand for re-sentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part, Reversed in Part, and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES , J.,joined. NORMA MCGEE OGLE, J., concurs in results only.

Ardena J. Garth and Donna Robinson Miller, Chattanooga, Tennessee, for the appellant, Kacy Dewayne Cannon.

Paul G. Summers, Attorney General and Reporter; Leslie Price, Assistant Attorney General; William Cox, III, District Attorney General; Mary Sullivan Moore and Boyd Patterson, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the rape of M.N.,[1] an eighty-year-old woman. At the Defendant's trial the following evidence was presented: Damany Norwood, an officer with the Chattanoooga Police Department, testified that he responded to the victim's call to police on the day of the crime. When he arrived at the crime scene he spoke with the victim, who seemed nervous and visibly shaken, and she told him what had occurred. He said that the victim told him that she and her sister observed an African-American man walking up and down the street in the front of their house. The victim said that the man came to her door and asked for a cup of water, she asked the man to sit outside, and then she got him some water. Norwood said that M.N. told him that the man complained about the water and, as M.N. began to shut the door, the man forced his way into her home, threw her on the couch, put a pillow over her face, lifted up her dress, and proceeded to have intercourse with her. On cross-examination, Norwood testified that the victim did not identify the Defendant as the perpetrator of this crime.

Darrell Whitfield, an investigator with the Chattanooga Police Department Crime Scene Unit, testified that he responded to a call reporting a rape that had occurred at the victim's residence. He explained how he processed the crime scene by taking photographs and checking for the suspect's latent fingerprints. Investigator Whitfield testified that he obtained two latent fingerprints on the inside of the front screen door, and he placed these prints into the Automated Fingerprint Identification System ("AFIS"), a computer program designed to read a fingerprint and match it with a possible suspect. On cross-examination, Investigator Whitfield agreed that neither of the latent

[1] In the interest of protecting the victim's privacy, we will use her initials as opposed to her full name.

fingerprints collected from the crime scene belonged to the Defendant. On redirect examination, Whitfield testified that he did not know if any of the fingerprints collected from the crime scene had been identified other than the victim's fingerprints.

Julie Marston, a registered nurse at Memorial Hospital, testified that the victim entered the emergency room reporting that she had been sexually assaulted, was seen by a treating physician, and received an assessment and some pain medication. Marston identified a medical record of the victim's emergency room visit, and this record was entered into evidence. Marston read the following portion of the victim's medical record to the jury, "Back pain after sexual assault. Patient is a healthy 80-year old, white female, who was sexually assaulted this afternoon. Complains of back pain located in lower back. No shortness of breath, chest pain or nausea or vomiting." The victim's medical records indicated that the victim's back pain was severe at times and that her back hurt when she walked, and Marston noticed that the victim had abrasions on her forehead.

Ardyce Redolfo testified that she works at the Sexual Assault Crisis Center and that, when this crime occurred, she was working as a Sexual Assault Nurse Examiner. In that capacity, Redolfo met the victim at Memorial Hospital, and the victim seemed shocked, talked copiously, rubbed her head with her hands, and said, "Oh dear." It was her opinion at the time that the victim had experienced trauma.

Redolfo testified that prior to examining the victim, a detective, Detective Dudley, had begun to question the victim. Redolfo then asked the victim multiple questions to determine exactly what

had happened so that she knew how to proceed with her examination. Redolfo also spoke with the emergency room nurses and doctors and Detective Dudley. Redolfo testified that she obtained a medical history and a detailed history of the assault from the victim, and she took notes documenting the assault by writing down exactly what the victim said. Redolfo testified that she also took notes in order to determine from where she needed to obtain swab samples and what areas she needed to photograph. She then read the statement that the victim provided:

> My sister and I were on the porch. This young man passed by the house and went to the top of the hill. My sister went home. He came back by and said hello. He came to the edge of the grass and asked me if I would be kind enough to get him a drink of water. I said, yes, and told him to stay there. I got him a drink in a paper cup. He took one drink and threw out the rest. I dismissed him. He turned toward the street. I went into the house. He pushed his way in from the back and threw me onto the couch. Threw the cushions off. Started ripping my clothes off. I screamed. He kept a pillow over my face. He had intercourse. I was terribly wet down there. I can't remember what he said. I never had anything like this happen to me before. He had my legs up over my head, my knees were by my head.

The victim also told her that the victim's back was very sore.

Redolfo described how she proceeded to examine the victim. She explained that she took pictures, collected vaginal fluid, combed the victim's pubic hair, took swab samples from the victim's vagina, and conducted a pelvic exam. Redolfo found blood on the victim's cervix and inside her vaginal vault, two conditions that are not normal in older women. She identified a photograph depicting a tear from the victim's vaginal opening to her rectum and explained that, based upon this and abrasions she found on the inside of the vaginal wall and the small labia, she opined that force had been applied to the vaginal area causing it to tear. Redolfo said that, while the

skin in an older person is fragile and will tear very easily, that area does not normally tear during intercourse when a person has gone through the proper foreplay and is ready for intercourse. She described the victim's other injuries, which included: small bruises on her face; an area that was bleeding where a scab had come off; a small bruise on the inner left thigh; a tear in the posterior fourchette; and abrasions on the inside of the labia and the vaginal wall.

Redolfo testified that, when she conducted her examination of the victim, the victim wore a hospital gown, the victim's clothes were in the hospital room, and the victim was not wearing pantyhose. She recalled that the victim had pantyhose with her and that she discussed the victim's undergarments with the victim, and Redolfo collected the pantyhose in case sperm or semen were located on them. Redolfo collected the pantyhose according to the typical business practice, which included putting the pantyhose in a specific envelope in the rape kit that is designated for the collection of underwear, and she identified the bag in which she had placed the pantyhose. Redolfo explained that she knows that these pantyhose belonged to the victim because they were in the victim's hospital room, they were with the victim's clothes, and no one else had been inside the victim's hospital room. Redolfo testified that she checked the pantyhose to see if they had blood and wetness on them, and, while she did not recall seeing any blood on the pantyhose, she said that the pantyhose were wet.

Redolfo testified that, after she obtained all the evidence, she sealed each envelope individually, placed all the envelopes in a box, and then sealed the box. After she sealed the box, she wrote her name over the tape sealing it, and then she carried the box back to the Sexual Assault

Center and locked it in a refrigerator. She testified that Detective Dudley signed for the box that contained the rape kit, but she was unsure whether she was the individual who gave him the box. She explained that the detectives normally have to sign out the rape kits from the Sexual Assault Crisis Unit and that there is a chain of custody that everyone must sign.

On cross-examination, Redolfo testified that the victim was already in her hospital gown when she examined her. Redolfo acknowledged that she did not receive any information about possible suspects or any information identifying the Defendant as a possible suspect. She acknowledged that she did not see who brought the victim's clothes into the hospital room, and she did not see the victim enter the hospital room in the victim's clothes. Redolfo further testified that everything that she saw in the victim's hospital room was already there when she arrived.

Brian Ingalls, M.D., testified that he was working at Downtown Memorial when the victim was brought into the hospital's emergency room, and he identified the victim's emergency department chart. He said that he examined the victim, and, according to her medical record, the victim was alert and oriented when she entered the emergency room. Dr. Ingalls said that the victim complained of lower back pain and reported that she had been sexually assaulted.

Dr. Ingalls testified that hospital protocol dictates that hospital rooms be cleaned between patients, and he has never known a patient to come into a hospital room that had not been cleaned for sanitary reasons. He could not recall a situation in which a patient was brought to the emergency room and put in an emergency room with someone else's clothing or any other items that did not

belong to a patient. Dr. Ingalls stated that he is careful not to interfere with anything that might be used in the evaluation of an assault, whether it be in clothing or body fluids.

Dr. Ingalls viewed a photograph of the victim and testified that she was wearing a hospital gown in the photograph, and it is protocol for nurses to give patients a hospital gown. He explained that the medical staff has been instructed not to tamper with a victim's clothing, and that usually the clothes are placed in a bag.

On cross-examination, Dr. Ingalls acknowledged that he did not recall examining the victim and that he based his testimony on the information contained in the victim's medical record and his knowledge of the protocol employed at Memorial Hospital. He acknowledged that he was not absolutely certain that the protocol and procedures he described were followed in regards to the victim's clothing. He acknowledged that he could not testify that he actually saw the victim's clothing, underwear or pantyhose. He acknowledged that he did not read anything in the victim's medical report that described how hospital personnel treated the victim's clothing. He agreed that a patient's emergency room treatment is documented in order to provide a clear idea of what occurred inside the emergency room and that, in the emergency room, several different events often happen at the same time.

Redolfo was recalled and she said that the pantyhose that she had previously described were with the victim's clothes in a hospital bag on a counter. She said that Detective Dudley removed the clothes from the hospital bag and placed them on the counter, and Redolfo photographed these

clothes. Redolfo described how she used a "Woods Lamp" to search for the presence of semen on the victim, and she detected semen on both the victim's bilateral groin areas and on the groin areas of the pantyhose. She explained that the area of the pantyhose that was wet matched the area of the victim that was wet. On cross-examination, Redolfo testified that she did not write that the pantyhose were wet when she wrote her report. She explained that she could identify the pantyhose that were entered into evidence as the pantyhose that she had found inside the victim's room because the pantyhose had several runs in the upper leg area.

Detective Charles Dudley testified that he was employed as a detective with the Chattanooga Police Department when this crime occurred, and he received notification of this offense while monitoring radio traffic. He said that, when he arrived at the crime scene, the victim had already been transferred to Memorial Hospital. He said he learned that the suspect was an African-American man, who was five feet and eight inches tall and had a "small but stocky build." Detective Dudley also learned that the suspect wore faded stonewashed jeans, a striped shirt, and a teal green jacket. Detective Dudley testified that he spoke with the victim's next door neighbor, Mike McDaniel, and with the victim's sister, Beth McGuire. He and some patrol officers canvassed the neighborhood, and a patrol officer found a man named Elijah Ellington a short distance from the crime scene. He said that a photograph taken of Ellington on the day of this crime showed that he was wearing a teal green jacket, stonewashed jeans, and a blue and white striped shirt. He said that, when McDaniel saw the suspect, McDaniel exclaimed, "[T]hat's him, that's him, that's the man that I saw on the porch." Detective Dudley testified that McDaniel's home is about twenty feet from the victim's porch.

The detective testified that, at the maximum, an hour and thirty minutes elapsed between the time he got the rape call and the time when he arrived at Memorial Hospital to meet with the victim. He said that prior to going to the hospital he contacted the officer in charge of communications at the hospital to inform him that the victim would need a sexual exam done at the Rape Crisis Center. Detective Dudley testified that, when he arrived at Memorial Hospital emergency room, he spoke with the charge nurse who escorted him to the victim's room. When he arrived at the victim's room, he saw the victim, who was wearing a hospital gown, Redolfo, and a nurse. He identified a photograph of the victim and a photograph of the clothing that he removed from the bag and placed on the counter, but he could not recall the specific items that he removed from the bag or if he removed a pair of pantyhose from the bag.

The detective said that he spoke with the victim for approximately fifteen minutes during which he told the victim that the police had the suspect in custody, and he offered to conduct a line-up of suspects for the victim to identify. He testified that the victim said that she did not think that she could identify the rapist because their encounter before the rape was brief and because the rapist had placed a pillow over her head while he raped her. He testified that the victim said that the rapist had pulled off her underwear and that "underwear" was the exact word that the victim had used.

Detective Dudley testified that he returned to the crime scene and spoke with McDaniel again to ensure that McDaniel could identify the suspect. He said that he asked McDaniel if he had looked at the suspect's face or if he identified the suspect by looking at his clothes, and McDaniel said that he identified the suspect by looking at his face. Detective Dudley said that he next tried to speak

with suspect Ellington, and Ellington denied having contact with anyone in response to rape allegations. Detective Dudley testified that he told the Assistant District Attorney that he had two people that identified Ellington and that Ellington was found a short distance away from the crime scene shortly after the crime had occurred but that there were no laboratory results. The Assistant District Attorney General asked if the victim or the victim's sister could identify the suspect, and he told the Assistant District Attorney General that both women stated that they could not identify the perpetrator of the crime. Detective Dudley testified that the Assistant District Attorney General said that the evidence they had against the suspect placed the State in a difficult position because the suspect could be a rapist, who might rape again if they let him go, and the man may be innocent and would be wrongfully incarcerated if they placed him in jail.

Detective Dudley testified that they charged suspect Ellington and obtained a court order to obtain his blood. He then sent the rape kit to Nashville for testing, and laboratory results came back showing that semen was found on the victim's pantyhose. Next, suspect Ellington's blood was sent for testing, and the results came back showing that the suspect was not the donor of the semen on the pantyhose. He explained how the DNA profile taken from the pantyhose was placed in the CODIS databank, and Mike Turbeville with the Tennessee Bureau of Investigation (TBI) later informed him that the semen matched the Defendant's DNA profile. The detective said that he and Detective Mayo arrested the Defendant in April of 2003. When they arrested him, they walked up to the Defendant, told him that they had a warrant for his arrest for an aggravated rape charge, and advised him of his Constitutional rights. After he advised the Defendant of his rights, the Defendant said, "I don't remember doing that," and "how much time is that?" He explained that when CODIS

matches a DNA profile collected from a crime scene with an individual's profile, the State's policy is to submit another blood sample from the individual; therefore, he requested a blood sample from the Defendant.

On cross-examination, Detective Dudley testified that suspect Ellington had a preliminary hearing and that he, the victim, and McDaniel testified at this hearing. He testified that Ellington was identified at this hearing and that the case was bound over to the grand jury. He explained that he obtained a blood sample from Ellington at Memorial Hospital. Further, he said that he picked up the rape kit from the Rape Crisis Center and described how the rape kit was transferred from the Rape Crisis Center to the TBI laboratory. The detective said that he did not receive any information indicating that the Defendant was a suspect on the day of the crime or at any time prior to receiving information from CODIS. Detective Dudley explained that he did not question the Defendant further after he arrested the Defendant and read the Defendant his rights because he did not think that the Defendant understood the seriousness of the charges against him.

Michael Ketchum, who previously used the last name McDaniel, testified that he lived next door to the victim when this crime occurred. He testified that he saw an African-American man sitting on the front porch of the victim's house on the day of the crime, which he thought was odd because the victim never had anyone over to her home. He testified that he went to his house, and about one-half hour to forty-five minutes later he came outside and saw a police car outside the victim's home, and he asked a man what had happened. Ketchum said that he learned that the victim had been assaulted, and he described to police the man that he had seen earlier on the victim's porch

as an African-American male with short hair, about five feet six inches tall, wearing a green jacket and faded blue jeans. He explained that he observed this man on the victim's front porch for a minute or two as he pulled past her house into his driveway, which was about fifty feet from the victim's porch. Ketchum identified a photograph of Ellington as the man that he saw on the porch on the day of the crime, and he identified this individual because the man was wearing faded pants and a green jacket. Ketchum explained that he was certain that the man in the photograph was the same man that he saw on the victim's porch on the day of the crime because both men wore a green jacket and the same pants. Ketchum testified that, at fifty feet away, he could not distinguish the man's facial features with one hundred percent certainty and acknowledged that he identified the man by what he wore and not by his facial features.

Constance Howard testified that she is a serologist, specializing in the field of DNA and that she is employed with the TBI. She said that she is the State CODIS Administrator, that she oversees the database, and that she serves as the liaison between the other states and the FBI. She explained how DNA samples are collected from blood stains and are sent to a computer that analyzes the DNA samples and compares it to information about other samples that is stored on the computer.

Michael Turbeville, a TBI special agent forensic scientist who works in the serology DNA unit, testified that he received a sexual assault kit from Detective Dudley and that the kit included a pair of pantyhose. He testified that he signed out the sexual assault kit from this case, and the kit contained a liquid blood standard from the victim, a pair of pantyhose, and an envelope with vaginal swabs and a microscope slide, in addition to a hair envelope with pubic hair combings and a form

that the sexual assault nurse filled out with the victim. Turbeville said that he tested the vaginal swabs and pantyhose from the rape kit for the presence of sperm and/or semen, and, while he determined that the vaginal swabs did not contain any semen, he detected semen on the top portion of the crotch area of the pantyhose above either the left leg or the right leg of the pantyhose. The agent cut this area of the pantyhose, and conducted DNA tests on this cutting. He said that he requested that the District Attorney's office provide a blood standard from any of the subjects involved with this case, and he received from Detective Dudley a liquid blood standard from suspect Ellington. Turbeville determined that the DNA profiles from the sperm found in the victim's pantyhose did not match Ellington's DNA profile, and he so informed Detective Dudley and the District Attorney's Office.

Turbeville testified that the DNA profile of the sperm in the victim's pantyhose was entered into the CODIS system in October of 2001. He said that, in May 2002, CODIS matched the DNA profile from the victim's pantyhose with another individual's DNA profile. After this "CODIS hit" occurred, he received some samples from Constance Howard to retest to ensure that the "CODIS hit" was accurate. He said that he re-tested the DNA samples to verify that the information received from CODIS was accurate and determined that the information from CODIS was correct. After conducting these tests, he discovered that CODIS matched the DNA profile of the sperm from the victim's pantyhose to the Defendant's DNA profile. He explained that he requested a liquid blood sample from the Defendant in order to submit the sample to the lab and to again verify that the profiles matched, and additional testing confirmed that the DNA profile from the Defendant matched the DNA profile from the sperm on the pantyhose. Agent Turbeville testified that the probability of

another individual having the same DNA profile as the Defendant exceeds the current world population.

Mike Mayo, a detective in the fugitive division of the Hamilton County Sheriff's Department, testified that he helped Detective Dudley arrest the Defendant. He described how Detective Dudley told the Defendant that he was being charged with aggravated rape and recalled that the Defendant said, "I don't remember doing that. How much time will that get me[?]" Mayo said that the Defendant did not seem upset, distraught, or surprised. On cross-examination, Mayo testified that the Defendant did not admit to raping the victim during this arrest.

Agent Howard was recalled and she testified that she received the DNA profile at issue on August 15, 2001. She said that a sample of the Defendant's DNA profile and other TBI samples were sent to Orchid Cellmark for analysis, and Cellmark analyzed the DNA and then returned the information to the TBI. Agent Howard testified that she uploaded the sample of the Defendant's DNA profile into the CODIS system on May 7, 2002. She testified that, on May 11, 2002, the profile that Agent Turbeville had obtained "hit" the sample that she had entered into the CODIS system. Agent Howard testified that the profile matched the profile of evidence that Turbeville had obtained belonged to the Defendant, and that the sample number for this profile was DO17199. On cross-examination, Agent Howard testified that her only involvement with this case was her analysis of the Defendant's blood.

Deanna Lankford, an employee at Orchid Cellmark, testified that she picked up sample

number D017199 from the TBI and logged the sample onto Cellmark's computer system. She explained that after Cellmark finishes testing a sample, the company compiles data and sends the sample back to the TBI. On cross-examination, she testified that two analysts examined the sample at issue and noted that the sample was weak. She explained that Cellmark must make sure that a DNA profile runs strongly enough so that it is above a certain threshold and that, after determining that the result for the sample was weak, the analysts reloaded the sample with more DNA. She said that the same analysts examined the DNA again, the analysis was successful, and the analysts determined that the analysis of the sample was acceptable.

Based upon this evidence, the jury convicted the Defendant of aggravated rape.

II. Analysis

On appeal, the Defendant contends that: (1) the trial court erred when it denied the Defendant's motion to suppress the identification of his DNA profile from the DNA databank; (2) the trial court erred when it allowed pantyhose into evidence after the State failed to establish a proper chain of custody; (3) the evidence is insufficient to sustain the Defendant's conviction; (4) his constitutional right to confrontation was violated; (5) the trial court erred when it denied the Defendant's motion to recuse; and (6) the trial court erred when it sentenced the Defendant.

A. Motion to Suppress

The Defendant contends that the trial court erred when it denied his motion to suppress the

warrantless taking of the Defendant's blood while in custody on an unrelated offense and the identification of his DNA profile from the DNA databank. He contends that these searches violated his rights against illegal searches under the Fourth Amendment to the United States Constitution and Article 1, section 7 of the Tennessee Constitution. The Defendant contends that the police should only be able to retrieve a specific defendant's DNA profile from the CODIS database when they have probable cause to check it against crime scene DNA. He further argues that the police should not be permitted to run random checks without first having some reasonable suspicion that a certain individual is the perpetrator of a crime. The Defendant also contends that he did not consent to the taking of his blood. The State contends that the trial court did not abuse its discretion when it denied the Defendant's motion to suppress.

The Defendant filed a motion to suppress the information obtained from his blood withdrawal and the ensuing DNA analysis. At the hearing on the motion to suppress, the Assistant District Attorney General informed the trial court that on December 8, 2000, the Defendant pled guilty and was convicted of attempted theft of property valued at more than ten thousand dollars, a Class D felony, and was ordered to provide a biological specimen for the purpose of DNA analysis. The record reflects that the Defendant's blood was collected on August 13, 2001. The Defendant signed a consent form indicating that he could not be paroled, receive good time, or otherwise be released if he refused to provide a DNA sample. The trial court found that "based on the way this blood was taken, all the circumstances, . . . this was not a violation of [the] Fourth Amendment or the equal protection clause or the due process clause of the United States Constitution or the Tennessee Constitution."

First, we review the trial court's denial of the Defendant's motion to suppress by the following well-established standard:

> Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld. In other words, a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise.

State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); see also State v. Hicks, 55 S.W.3d 515, 521 (Tenn. 2001). The trial court's application of law to the facts, as a matter of law, is reviewed de novo, with no presumption of correctness. State v. Daniel, 12 S.W.3d 420, 423 (Tenn. 2000).

The Defendant's blood was taken pursuant to Tennessee Code Annotated section 40-35-321(d) (2003), which requires that any person convicted of any felony offense committed on or after July 1, 1998, shall provide a DNA sample. The statute provides in pertinent part that:

> (1) When a court sentences a person convicted of any felony offense committed on or after July 1, 1998, it shall order the person to provide a biological specimen for the purpose of DNA analysis as defined in subsection (a). If the person is not incarcerated at the time of sentencing, the order shall require the person to report to the county or district health department, which shall gather the specimen. If the person is incarcerated at the time of sentencing, the order shall require the chief administrative officer of the institution of incarceration to designate a qualified person to gather the specimen. The biological specimen shall be forwarded by the approved agency or entity collecting such specimen to the Tennessee bureau of investigation which shall maintain it as provided in § 38-6-113. The court shall make

> the providing of such a specimen a condition of probation or community correction if either is granted.

In State v. Scarborough, —S.W.3d—, 2006 WL 2471439, at *6 (Tenn. 2006), the Tennessee Supreme Court addressed the constitutionality of DNA evidence that led to rape charges against an inmate, based on his DNA profile obtained under the DNA collection statute, while he was imprisoned on an unrelated charge. The Court held that a blood draw, and the ensuing chemical analysis of the blood, is subject to constitutional limitations of the Fourth Amendment and article I, section 7, of the Tennessee Constitution, which protect against unreasonable searches and seizures. Id. at *5. Our Supreme Court held that "searches of incarcerated felons undertaken pursuant to Tennessee's DNA collection statute pass constitutional muster when they are reasonable under all of the circumstances." Id. at *7. After examining the defendant's right to privacy against the State's interest in identification of defendants, the Scarborough Court reached the following conclusion:

> In sum, our legislature has put into place a method of more accurately identifying those who commit and are convicted of felonies, thereby enabling law enforcement personnel to more quickly and accurately exonerate the innocent and prosecute the perpetrators. The gravity of the public concern served by the instant searches is therefore significant. Given the heightened accuracy of DNA analysis compared to more traditional methods of identification, such as fingerprints and eyewitness testimony, the degree to which the DNA collection statute advances that interest is also significant. Additionally, Tennessee's DNA collection statute clearly and unambiguously specifies who is subject to the searches: the risk of arbitrary or capricious searches is therefore eliminated. Further, no measure of individualized suspicion is necessary because the searches are not aimed at recovering incriminating evidence of contemporaneous criminal conduct. Finally, we have determined that the convicted felons subject to search pursuant to the statute have a significantly reduced expectation of privacy.

Id. at *10. The Scarborough Court concluded that a search like the one authorized by Tennessee

Code Annotated section 40-35-321, which is intended to identify individuals with a lessened expectation of privacy, is distinguishable from a search of an ordinary individual for the purpose of gathering evidence against them in order to prosecute them for crimes that the search reveals. Id. at *11 (quoting from State v. Raines, 857 A.2d 19, 33 (Md. 2004). Then, applying the totality of the circumstances test, the Court concluded that the blood draw at issue, and subsequent analysis, were reasonable under all of the circumstances and therefore did not violate the defendant's Fourth Amendment rights. Id.

In the case under submission, we conclude that the Defendant fell within the perimeters of Tennessee Code Annotated section 40-35-321(d) in that he was convicted of a felony on December 8, 2000. Applying the totality of the circumstances test, we conclude that the blood draw from the Defendant, and its subsequent analysis, were reasonable under all of the circumstances. Therefore, the Defendant's rights pursuant to the Fourth Amendment were not violated.

Further, in response to the Defendant's contention that his consent was not voluntary because his sentencing credits and parole eligibility were dependant upon his consent to the taking of his blood, we note that the Scarborough Court addressed this issue. One of the defendants in Scarborough signed a similar consent provision that made parole eligibility dependant upon the defendant's providing of a DNA sample. Scarborough, 2006 WL 2471439, at *3. The Court held that, under the facts presented in that case, the evidence did not preponderate against the trial court's finding that the defendant consented to having his blood drawn. Id. at *13. Further, our Supeme Court concluded that the consent was knowing and voluntary. Id.

In the case under submission, we conclude that the evidence does not preponderate against the trial court's finding that the Defendant consented to having his blood drawn. Therefore, the Defendant is not entitled to relief on this issue.

B. Chain of Custody

The Defendant contends that the trial court erred when it allowed the State to introduce into evidence pantyhose that were not properly authenticated. He contends that a lack of documentation and conflicting testimony show that there is a missing link in the chain of custody for the pantyhose. Further, he argues that it is impossible to know if the pantyhose in question were ever worn by the victim. The State counters that the evidence established a sufficient chain of custody for the pantyhose.

The State entered the pantyhose into evidence during Redolfo's testimony, and the following dialogue ensued:

> MS. GARTH: I may have to object. Did she get [the pantyhose] from [the victim] or were they already sitting there? Because I have to object if she did not get them from her.
> THE COURT: She said they discussed them. She took them as part of the evidence.
> MS. GARTH: Okay. But there was also a police officer
> THE COURT: It goes to weight, not admissibility.
> MS. GARTH: Okay.
> THE COURT: Do you know what I'm saying? She could have found them on the floor or up in a chair, if it is in a room it might be relevant – might be admissible, you know what I'm saying?

Dr. Ingalls testified about the protocol regarding the treatment of hospital rooms and the preservation

of patients' clothing at Memorial Hospital. Redolfo again testified and the Rape Crisis Kit and the pantyhose were entered into evidence over the Defendant's objection.

In order to admit physical evidence, the party offering the evidence must either introduce a witness who is able to identify the evidence or must establish an unbroken chain of custody. State v. Holbrooks, 983 S.W.2d 697, 700 (Tenn. Crim. App. 1998). The identity of tangible evidence need not be proven beyond all possibility of doubt, and all possibility of tampering need not be excluded. State v. Scott, 33 S.W.3d 746, 760 (Tenn. 2000). The requirement that a party establish a chain of custody before introducing such evidence is "'to demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence.'" Id. (quoting State v. Braden, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993)). The circumstances must establish a reasonable assurance of the identity of the evidence. State v. Kilburn, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989). The failure to call all of the witnesses who handled the evidence does not necessarily preclude its admission into evidence. See State v. Johnson, 673 S.W.2d 877, 881 (Tenn. Crim. App. 1984). Absolute certainty of identification is not required. State v. Kilpatrick, 52 S.W.3d 81, 87 (Tenn. Crim. App. 2000). "Reasonable assurance, rather than absolute assurance, is the prerequisite for admission." Id. Whether the required chain of custody has been sufficiently established to justify the admission of evidence is a matter committed to the sound discretion of the trial court, and the court's determination will not be overturned in the absence of a clearly mistaken exercise of that discretion. State v. Holloman, 835 S.W.2d 42, 46 (Tenn. Crim. App. 1992).

The trial court did not abuse its discretion by allowing the victim's pantyhose to be

introduced into evidence. We point out that the Defendant does not attack the chain of custody regarding the pantyhose that occurred after Redolfo collected the pantyhose from the victim's hospital room. Instead, the Defendant only contends that the State failed to prove that the pantyhose found in the victim's room did in fact belong to the victim. Therefore we will narrow our analysis to this issue.[2] The pantyhose were identified by many witnesses as an item that was taken from the victim's belongings. Detective Dudley testified that, when he arrived at the victim's hospital room, her clothing was placed inside a hospital bag. Dr. Ingalls testified about the protocol at Memorial Hospital for cleaning hospital rooms between patients, the treatment of patients' clothing, and training that the medical staff received about preserving evidence when treating rape victims. Redolfo explained that the victim's clothing was in a hospital bag on a counter in the victim's room and that the pantyhose were inside this bag. She testified that the victim identified the clothes in the room as her own. She testified that she collected the pantyhose, put them in a sealed bag, and transported them along with the rest of the rape kit to the Rape Crisis Center. Redolfo viewed the pantyhose at trial and testified that they were the same ones that were found in the victim's hospital room. Based upon the proof presented, we conclude that the "circumstances surrounding the evidence reasonably establish the identity of the evidence and its integrity." Scott, 33 S.W.3d at 760.

The Defendant raises several arguments that revolve around the strength of the evidence presented at trial used to establish the chain of custody. He contends that Redolfo's testimony about

[2]However, we note that the evidence presented at trial established that the pantyhose belonged to the victim and that these same pantyhose were collected from the victim's hospital room and sent to the TBI where the Defendant's semen was found on the pantyhose.

the victim's pantyhose is not credible because she testified after hearing Dr. Ingalls testify about the pantyhose and because her detailed notes did not describe the pantyhose. The Defendant also argues that various reports refer to the victim's "panties" but do not refer to the victim's pantyhose. He further argues that no one testified about seeing the victim undress and that Detective Dudley did not recall seeing the victim's pantyhose. However, questions regarding the credibility of the witnesses and the weight of the evidence used to establish the chain of custody are matters entrusted to the trial judge and will not be overruled absent an abuse of discretion. See State v. Kirby G. Thurmon, No. 02C01-9512-CR-00375, 1996 WL 594085, at *4 (Tenn. Crim. App., at Jackson, Oct. 17, 1996) (affirming trial court's determination that the chain of custody was sufficiently established despite conflicting testimony about the evidence). In our view, the trial court did not abuse its discretion when it admitted the pantyhose into evidence.

The Defendant further contends that he is entitled to relief pursuant to the holding in the Scott decision. In Scott, our Supreme Court reversed the defendant's convictions for rape and aggravated sexual battery and remanded the case for a new trial after the trial court had improperly denied the defense a DNA expert and the State had failed to establish a link in the chain of custody for a hair from the victim's inner thigh which had the same DNA sequence as the one found in the defendant's blood sample. Scott, 33 S.W.3d at 761. In State v. Bobby Shellhouse, No. E2001-01604-CCA-R3-CD, 2002 WL 31202135, at *6 (Tenn. Crim. App., at Knoxville, Oct. 3, 2002), *perm. app. denied* (Tenn. Feb. 18, 2003), this Court declined to overturn the trial court's ruling as to admissibility on the chain of custody after the defendant argued that the Scott decision required such a reversal. In Shellhouse, this Court explained that:

> We do not interpret Scott to say that every link or individual in the chain of custody must necessarily testify. The court therein observed that evidence may be admitted when the circumstances surrounding the evidence reasonably establish the identity and integrity of the evidence and its criteria.
>
> The missing link in Scott involved more than a functionary duty. It concerned a lapse of explaining how or by whom two victims' hairs were mounted on microscope slides. This hiatus of evidence raised legitimate concerns as to both integrity and identification, the very reasons for establishing proper chain of custody.

Id. at *5 (citations omitted). This analysis of Scott is helpful in understanding the case under submission. In the instant case, no concerns arose regarding the State's ability to establish both the identity of the evidence and the integrity of the examination performed on the evidence. In contrast, the State provided a thorough chain of custody for all of the steps involved in the examination of the pantyhose. The only alleged missing link occurred before the pantyhose were examined. Again, we note that Redolfo's testimony, Dr. Ingall's testimony, and Detective Dudley's testimony provided sufficient evidence to establish that the pantyhose belonged to the victim and that she had worn them on the day of the crime. We again note that in Scott our Supreme Court held that the "identity of tangible evidence, however, need not be proven beyond all possibility of doubt." Scott, 33 S.W.3d at 760. The Defendant is not entitled to relief on this issue.

C. Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to support his conviction for aggravated rape. Specifically, he argues that the State failed to properly authenticate the pantyhose that contained the semen, the only evidence incriminating the Defendant in this case. The State

contends that the evidence established that the Defendant is guilty of aggravated rape.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Goodwin, 143 S.W.3d 771, 775 (Tenn. 2004) (citing State v. Reid, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass,13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, and all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In

> the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing Carroll v. State, 370 S.W.2d 523, 527 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. Goodwin, 143 S.W.3d at 775. Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000). However, before an accused can be convicted of a criminal offense based on circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). In other words, "a web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Id. at 613. The State is obligated to prove beyond a reasonable doubt that the defendant was the person who committed the crime in question. See State v. Sneed, 908 S.W.2d 408, 410 (Tenn. Crim. App. 1995). This is a question of fact for the determination of the jury following consideration at trial. State v. Crawford, 635 S.W.2d 704, 705 (Tenn. Crim. App. 1982). Aggravated rape is defined, in pertinent part, as the "unlawful sexual penetration of a victim by the defendant or the defendant by a victim" where "[t]he defendant causes bodily injury to the victim." Tenn. Code Ann. § 39-13-502(a)(2).

We note that the only issue that the Defendant contests is his identity as the perpetrator of the crime. The Defendant acknowledged that the victim was brutally raped but alleged that he did not commit the crime. Because the Defendant does not contest that the rape occurred or that the victim suffered bodily injury, we will not address these issues on appeal.

After viewing the evidence in the light most favorable to the State, it is evident that a rational trier of fact could have found that the Defendant committed the aggravated rape in question. In support of the Defendant's conviction, the State presented the testimony from six different witnesses to explain the DNA analysis that occurred in this case. These State witnesses established that the DNA analysis matched the DNA from the semen collected as a part of the sexual assault kit with the DNA from a sample of the Defendant's blood. Agent Turbeville testified that the probability of an another individual having the same DNA profile as the Defendant exceeds the current world population. Based on the foregoing, sufficient evidence was presented to show that the Defendant is guilty of aggravated rape.

The Defendant argues that the State failed to properly authenticate the pantyhose and that there is not another "scintilla" of evidence that incriminates the Defendant. However, this Court has recently held that DNA evidence alone may be sufficient to establish guilt. State v. Darrell Toomes, 191 S.W.3d 122, 129 (Tenn. Crim. App. 2005) (concluding that the evidence was sufficient to sustain the Defendant's aggravated rape conviction although "the only . . . evidence connecting the defendant to the victim's rape [was] DNA results"). As previously discussed, sufficient evidence was presented at trial to establish a chain of custody for the pantyhose. The Defendant also argues

that other witnesses identified another man as the perpetrator of the crime. However, the jury accredited the DNA evidence presented at trial, and this Court does not second-guess the weight, value, or credibility afforded to the evidence by the jury. We conclude that the State presented sufficient evidence of identity to support the Defendant's conviction. Therefore, the Defendant is not entitled to relief on this issue.

D. Right to Confrontation

The Defendant next asserts that he was deprived of his right to confrontation because he was not able to cross-examine the victim. The Defendant contends that the State withheld information about the victim's inability to testify in order to introduce otherwise inadmissible evidence. Further, he contends that the victim's mental condition may have affected her credibility. The State counters that the victim's statements regarding her sexual assault were properly admitted into evidence, and the Defendant's inability to cross-examine the victim's statements did not violate the Confrontation Clause.

The record reflects that the Defendant moved for a judgment of acquittal because he had been deprived of his right to cross-examine the victim. The Defendant asked to call the victim to the stand, and the State informed the trial court that the victim was unavailable to testify because the victim suffered from severe dementia and Alzheimer's disease. The record reflects that, throughout the trial, the State indicated that it was unsure whether the victim would testify at trial. The Defendant argued at trial that the State failed to notify the Defendant that the victim was unavailable

as a witness, and an Assistant District Attorney General replied that the State had no obligation to so inform the Defendant. The Assistant District Attorneys General[3] informed the trial court that they did not speak with the victim until shortly before trial and were not aware that the victim would not be able to testify.

The trial court noted that the victim was not the actual accuser of the Defendant because she never identified the Defendant as the perpetrator of the crime. The trial court observed that the DNA evidence was the evidence that actually linked the Defendant to the rape of the victim. The trial court further noted that the Defendant did not contest that the victim had been raped but denied that he was the rapist. The trial court ruled that the Defendant was able to sufficiently cross-examine all of the witnesses who identified the Defendant as the perpetrator of the crime through their testimony about the DNA evidence. The trial court therefore denied the Defendant's motion for acquittal.

The Confrontation Clause of the United States Constitution guarantees a criminal defendant the right to confront witnesses against him or her. See U.S. Const. amend. VI; Davis v. Alaska, 415 U.S. 308, 315 (1974). This right is also protected by the Tennessee Constitution. See Tenn. Const., art. I, § 9. "[T]he confrontation clause provides two types of protection for criminal defendants: the right to physically face the witnesses who testify against the defendant, and the right to cross-examine witnesses." State v. Williams, 913 S.W.2d 462, 465 (Tenn. 1996) (citing Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987), and State v. Middlebrooks, 840 S.W.2d 317, 332 (Tenn. 1992)). The right to confront and cross-examine is not absolute however, and may, in appropriate cases, bow

[3]This Court notes that two Assistant District Attorneys General represented the State at trial.

to accommodate other legitimate interests in the criminal trial process. See Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court examined the Confrontation Clause and determined that out-of-court hearsay statements that are testimonial in nature are not admissible under the Confrontation Clause unless the State shows that the declarant is unavailable to testify and the defendant has had the opportunity to cross-examine the declarant. Id. at 53-54. The Crawford Court further explained that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at 68-69. Crawford v. Washington distinguished between the proper treatment of testimonial and nontestimonial with the following explanation:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Id. at 68. The Crawford decision did not spell out a comprehensive definition of the word testimonial; however, the Court stated that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." Id.

In March of 2006, the United States Supreme Court's decision in Davis v. Washington, —U.S.—, 126 S.Ct. 2266, 2273-74 (2006), further distinguished between testimonial and nontestimonial statements in the limited context of police interrogations with the following language:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Davis Court further explained, "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Id. at 2273.

In State v. Maclin, 183 S.W.3d 335 (Tenn. 2006), the Tennessee Supreme Court provided the following factors to consider when deciding whether a particular statement is testimonial:

> (1) whether the declarant was a victim or an observer; (2) whether contact was initiated by the declarant or by law-enforcement officials; (3) the degree of formality attending the circumstances in which the statement was made; (4) whether the statement was given in response to questioning, whether the questioning was structured, and the scope of such questioning; (5) whether the statement was recorded (either in writing or by electronic means); (6) the declarant's purpose in making the statements; (7) the officer's purpose in speaking with the declarant; and (8) whether an objective declarant under the circumstances would believe that the statements would be used at a trial.

Id. In Maclin, our Supreme Court noted that this "list is not exhaustive; other considerations may also be meaningful depending on the particular facts of the case." Id. The Maclin decision also

explained that the language of Crawford points to the following objective standard for determining whether a particular witness's statement is testimonial: "[W]hether the statement was made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Id. at 349 (quoting Crawford, 541 U.S. at 52).

In the case under submission, the victim's statements about her rape were introduced through testimony from Officer Norwood, Officer Dudley, the victim's medical records, and Redolfo's testimony.

1. Officer Norwood and Officer Dudley

We conclude that the trial court erred when it allowed Officer Norwood and Officer Dudley to testify about the victim's statements regarding her rape. Officer Norwood explained that, when he arrived at the crime scene, he spoke with the victim, and she told him what had happened. When the victim told him about the rape, the crime had already occurred, and Officer Norwood was not seeking to quell an instantaneous emergency. Similarly, Officer Dudley testified that he spoke with the victim after the crime had occurred and she had been safely transported to Memorial Hospital. Like the statements labeled as testimonial by the Davis Court, the victim's statements in both of these situations "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation." Davis, 126 S.Ct. at 2279. Because Officer Norwood and Officer Dudley spoke with the victim in order to learn about past conduct and not in order to address an instantaneous emergency, admitting their testimony about the victim's statements violated

the Defendant's right to cross-examine. Id.

However, we find that the admission of these statements into evidence constituted harmless error. Both the United States Supreme Court and the Tennessee Supreme Court have held that violations of the Confrontation Clause are subject to a harmless error review. Coy v. Iowa, 487 U.S. 1012, 1021 (1988); State v. Gomez, 163 S.W.3d 632, 647 (Tenn. 2005). In the case under submission, the statements at issue only established that the victim was raped, which was not a point of contention. The Defendant only contested his identity as the perpetrator of the crime. The witnesses who testified about the DNA evidence, not the victim, countered the Defendant's assertion that he was not the perpetrator of the crime. The Defendant received ample opportunity to cross-examine all such State witnesses. Furthermore, the record provides ample evidence besides the officers' testimony that establishes that the victim was raped. Therefore, the Defendant is not entitled to relief on this issue.

2. Medical Records[4]

Further, we conclude that the trial court did not err when it allowed the statement in the victim's medical records about her sexual assault into evidence, and the Defendant's right to confrontation was not violated. The Crawford opinion indicates that business records are not testimonial in nature. Crawford, 541 U.S. at 56. The Crawford Court noted, "Most of the hearsay

[4]We note that the Defendant failed to object to the introduction of the victim's statement in her medical records at trial. Therefore, he has risked waiving this complaint. See Tenn. R. App. P. 36(a). We will, however, address this issue on the merits.

exceptions covered statements that by their nature were not testimonial- for example, business records or statements in furtherance of a conspiracy." Id. In the case under submission, the victim's medical records state that the victim's chief complaint was that she had been sexually assaulted. The victim provided this statement to healthcare professionals for treatment rather than testimonial purposes. Therefore, the statement in the medical records is not testimonial, and the Defendant is not entitled to relief on this issue.

3. Redolfo

Finally, we conclude that the trial court did not err when it allowed Redolfo testify about the victim's statements regarding her rape. The victim did not provide Redolfo with a testimonial statement. We recognize that Redolfo asked the victim structured questions and recorded the victim's answers. However, the victim did not initiate contact with Redolfo, and she provided Redolfo with information about being raped for treatment purposes in a hospital setting. The record reflects that Redolfo questioned the victim after the victim was taken to her hospital room, was undressed, and had spoken with other healthcare professionals about the assault. Therefore, before the victim spoke with Redolfo, she had been discussing her rape in a medical context, and medical purposes were Redolfo's motivation for asking the victim about the rape. Redolfo asked the victim questions about the rape in order to determine how to best examine the victim. Thus, the victim's statement was made for medical not testimonial purposes, and the victim was not acting as a witness when she spoke with Redolfo. The Defendant is not entitled to relief on this issue.

E. Motion to Recuse Trial Judge

The Defendant contends that the trial court erred when it denied his motion to recuse. Specifically, the Defendant asserts that the relationship between the trial court and the Assistant District Attorney General precluded the trial court from making appropriate rulings during the Defendant's trial. The Defendant disagrees with the trial court's holdings, maintains that the Assistant District Attorney General acted unethically, and suggests that the trial court's decisions were affected by her relationship with the Assistant District Attorney General. The Defendant also contends that the trial court should have reprimanded the Assistant District Attorney General for failing to reveal that the victim was unavailable to testify. The Defendant contends that the trial court decided not to address the issue of unavailability of the victim to testify in order to avoid addressing the Assistant Attorney General's alleged deceitful conduct. He also again argues that the trial court should have found that the Defendant's right to confrontation was violated and should have granted a mistrial because he was deprived of the opportunity to call the victim to testify. The Defendant further argues that the trial court should have disqualified herself in order to avoid the appearance of impropriety. He contends that it is important to the integrity of the criminal justice system that the public's confidence in the impartiality of its judiciary not be affected by any appearance of bias.

The record reflects that on June 4, 2004 defense counsel filed a motion to recuse or disqualify the trial judge on the basis of the friendship between Assistant District Attorney General (A.D.A.)

Moore and the trial court. On June 28, 2004, defense counsel filed an affidavit in support of her motion and testified that she met with the trial court and A.D.A. Moore on May 14, 2004, and asked them if they had traveled to Cancun, Mexico together. In an affidavit, defense counsel informed this Court that the trial judge and A.D.A. Moore acknowledged that they took the trip together and that they said that they traveled with others and had only one meal alone together during the trip. Defense counsel acknowledges that her affidavit is not a complete transcript of what occurred during the meeting in the judge's chambers, but was a description of the meeting according to her recollection. In a responding affidavit, A.D.A. Moore informed this Court that fifteen other people attended the trip to Cancun, Mexico.

At the hearing on the motion for recusal, defense counsel voiced her concerns and frustrations about the victim's unavailability to testify, the A.D.A.'s failure to inform her about the victim's unavailability, and the trial court's decision to refrain from ruling on the victim's availability. Defense counsel further argued that the State had an ethical duty to provide defense counsel with information about the victim's inability to testify. The trial court noted that the parties in this case had discussed the possibility of using prior transcripts of the victim's testimony made under oath if the victim could not testify. Defense counsel acknowledged that she was aware of this possibility and that arrangements to address the victim's inability to testify were in the process of being made, but contended that she never received any more information about the victim's inability to testify. The trial court asked defense counsel what she would have asked the victim if the victim had testified, and defense counsel testified that she would have asked the victim if she could identify the Defendant. Defense counsel acknowledged that the victim had never accused the Defendant, but

contended that, nevertheless, the Defendant had been deprived of his right to cross-examine. The trial court denied the Defendant's motion for recusal.

Whether recusal is necessary, based upon the alleged bias or prejudice of the trial judge, rests within the discretion of the trial court. State v. McCary, 119 S.W.3d 226, 260 (2003). Any motion to recuse is addressed to the sound discretion of the trial court and will not be reversed unless "clear abuse" appears on the face of the record. State v. Conway, 77 S.W.3d 213, 224 (Tenn. Crim. App. 2001). Unless the evidence in the record indicates that the trial judge clearly abused his or her discretion by not disqualifying himself or herself, a reviewing court may not interfere with the decision. State v. Hines, 919 S.W.2d 573, 578 (Tenn. 1995).

Tennessee Supreme Court Rule 10, Canon 2(A) states, "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The commentary for this rule provides that:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.
>
> . . . .
>
> The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

Tenn. Sup. Ct. R. 10, Canon 2, Commentary. This Court has previously noted that a trial judge should grant a motion to recuse whenever the judge "has any doubt as to his [or her] ability to preside impartiality in a criminal case or whenever his or her impartiality can reasonably be questioned." Pannell v. State, 71 S.W.3d 720, 725 (Tenn. Crim. App. 2001). However, because perception is important, recusal is also appropriate "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." Alley v. State, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). While the first inquiry is a subjective test, the second is an objective standard. Id.

The Defendant has failed to show that the trial court abused her discretion by failing to recuse herself from the instant case. We first note that the Defendant has failed to show that his case was prejudiced due to the A.D.A.'s relationship with the trial judge. We believe that the trial court's rulings were fair and unbiased. The record contains several instances in which the trial judge sustained the Defendant's objections and ruled in the Defendant's favor. As previously discussed, this Court does not conclude that the trial judge made erroneous decisions as a matter of law in regards to the chain of custody for the pantyhose and the only errors concerning the Defendant's right to confront State witnesses were harmless. The Defendant has failed to establish that the trial court declined to address any issue due to her relationship with the Assistant District Attorney General. We conclude that the Defendant has failed to show any acts of favoritism towards the prosecution or bias against the Defendant. Therefore, we respectfully disagree with the Defendant's contention

that the trial court allowed her relationship with the A.D.A. to cause her to be biased in favor of the State. The trial court did not abuse its discretion when it denied the motion to recuse, and the Defendant is not entitled to relief on this issue.

F. Sentencing

The Defendant contends that the trial court erred when it sentenced him to thirty-two and one- half years in confinement. Specifically, the Defendant contends that the State asked the trial court to reconsider his sentence and that no proper mechanism exists to justify the State's request. He also asserts that the double jeopardy clause of the Tennessee and United States Constitutions precludes re-sentencing based on the State's motion to reconsider. He also argues that the State failed to object to the trial court's decision that the Defendant's presumptive minimum sentence was twenty-five years instead of the mid-point of his range which was thirty-two and one-half years. The Defendant also contends that the trial court failed to consider all of the mitigating factors during the Defendant's sentencing rehearing.

The Defendant was convicted as a Range II offender of aggravated rape, a Class A felony with a sentencing range of twenty-five to forty years. See Tenn. Code Ann. §§ 39-13-502(b), 40-35-106 (2003). The record reflects that the trial court originally sentenced the Defendant to twenty-five years in the Department of Correction, the minimum sentence for his range. At the sentencing hearing, the Defendant conceded that he could be sentenced as a Range II offender. However, the

trial court concluded that the Blakely v. Washington, 542 U.S. 296 (2004), decision dictated that the trial court could not sentence the Defendant above the minimum without any enhancement factors being found by a jury. However, because Blakely was decided between the time of the trial and sentencing in this case, the trial court allowed the parties thirty days to research the issue of whether a jury could be recalled for sentencing purposes. The trial court then stated:

> I do find based on the evidence that he is a Range II by the prior convictions, that they are sufficient to establish him as a Range II offender. However, under Blakely I feel compelled to set his sentence at the minimum within that because I cannot find under Blakely enhancing factors. So I set his sentence under Blakely at twenty-five years, Range II. That's the minimum sentence for a Range II sentence in Class A felonies.

Following the sentencing hearing, the prosecution filed a motion to reconsider the Defendant's sentence. The trial court, at the request of the State, rescinded the original judgment and set the case for a new sentencing hearing. At that hearing, the trial court found that six of the Defendant's seven mitigating factors applied, but it held that the factors were not sufficient to reduce the sentence below the minimum presumptive sentence. The trial court modified the Defendant's sentence from 25 years to 32.5 years in accordance with Tennessee Code Annotated section 40-35-210(c), which states that the presumptive minimum sentence for a Class A felony is the midpoint of the range. Although the Defendant asserts that the trial court erred when it granted the State's motion to reconsider the sentence, because on appeal we are remanding for re-sentencing, we deem it unnecessary to address that issue.

The Blakely Court called into question the continuing validity of our current sentencing scheme when it struck down a provision of the Washington sentencing guidelines that permitted a trial judge to impose an "exceptional sentence" upon the finding of certain statutorily enumerated enhancement factors. Blakely, 542 U.S. at 302. The Court observed that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 303. Finally, the Court concluded that "every defendant has the right to insist that the prosecutor prove to a jury [beyond a reasonable doubt] all facts legally essential to the punishment." Id. at 313.

In State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005), our Supreme Court held that the Blakely decision does not apply to Tennessee sentencing guidelines and determined that Tennessee's Sentencing Act does not violate the Sixth Amendment and stated:

> The Reform Act [of Tennessee] authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors . . . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature. Id. at 661.

In the case under submission, the record clearly reflects that the trial court's sentencing decisions resulted from confusion about how Blakely affected Tennessee's sentencing scheme. Given the dictates of Gomez, we must conclude that Blakely does not bar the trial court from enhancing the Defendant's sentence pursuant to Tennessee Code Annotated section 40-35-114. Therefore, we remand this case for re-sentencing so that the trial court may properly consider and

apply enhancement factors submitted by the State.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgment of the trial court as to the Defendant's conviction for aggravated rape, but remand for re-sentencing in accordance with this opinion.

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ROBERT W. WEDEMEYER, JUDGE